1972

Flora Kesler v. Sherman Brimley Tate and Burton L. Tate v. Transnational Insurance Company : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORA KESLER,
Plaintiff and Respondent,

vs.

SHERMAN BRIMLEY TATE and
BURTON L. TATE,
Defendants and Respondents,

and

TRANSNATIONAL INSURANCE
COMPANY,
Intervenor and Appellant.

CASE NO.
12806

BRIEF OF APPELLANT

Appeal from the Order
of the Third Judicial District Court
Salt Lake County, State of Utah
Honorable James S. Sawaya, Judge

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STATEMENT OF THE KIND OF CASE

This is an action by plaintiff against the defendants, uninsured tort-feasors, for property damage and bodily injury sustained in an automobile accident. Plaintiff has uninsured motorist insurance coverage with appellant who seeks to enter this action as a party to protect its interests therein. Both plaintiff and defendants object to intervention in this action by Transnational Insurance Company.

DISPOSITION IN THE LOWER COURT

Upon becoming aware of the initiation of this action by plaintiff, her uninsured motorist carrier, Transnational Insurance Company, made a Motion for Leave to Intervene in this action in order to protect its interests therein. Upon the hearing of the company's Motion, which was resisted by both plaintiff and defendants, the District Court of Salt Lake County, Honorable James S. Sawaya, denied Transnational Insurance Company the right to intervene in the action. It is from that Order that Intervenor appeals.

RELIEF SOUGHT ON APPEAL

Intervenor-Appellant, Transnational Insurance Company, seeks to have the Order of the Lower Court reversed which denied it the right to intervene in this action.

STATEMENT OF FACTS

On September 22, 1970, plaintiff, Flora Kesler, was driving her 1967 Chrysler automobile, and at the time in question was apparently stopped at the intersection of 1300 South Street and State Street in Salt Lake City, Utah, in obedience to a red traffic semaphore (R 1, 4). Defendant Sherman Tate, while driving a dump truck owned by his father, Burton L. Tate, collided with plaintiff's vehicle. (R 1, 4). Plaintiff claims to have sustained personal injury in the accident (R 2), which allegations defendants deny. (R 4). The Tates also claim as an affirmative defense that the accident was unavoidable as to defendant Sherman Tate. (R 4).

Prior to the time of the accident referred to above, Transnational Insurance Company issued to plaintiff, Flora Kesler, its automobile liability insurance policy which provided, inter alia, coverage for damage or injury caused by uninsured motorists. (R 16, 18). The Tates did not have liability insurance on the truck which was involved in the accident with plaintiff (R 16, 18), therefore the uninsured motorist coverage of plaintiff's policy with Transnational Insurance Company is applicable.

Plaintiff filed her action against both defendants for property damage to her car and bodily injury to herself seeking a monetary award for general damages of $75,000.00, medical expenses of $400.00, loss of use of $220.00, Court costs and other relief which the Court deems proper. (R 1-2). Joel M. Allred, Salt Lake City attorney represents plaintiff in this action and Greg Hawkins of the firm of Henriksen, Fairbourn and Tate represents the defendants.

After the action was filed, appellant attempted to participate in the defense of the action but was refused such participation by defendants and their attorney. Thereafter, appellant, by and through its attorney, D. Gary Christian of the firm of Kipp and Christian filed its Motion or Leave to Intervene in the action claiming the right to litigate the matters of liability and damages by way of filing an answer to plaintiff's complaint as a defendant intervenor in order to protect its interests. (R 16-17). The Motion was argued before the Honorable James S. Sawaya, one of the Judges of the District Court of Salt Lake County on January 26, 1972. (R 41). At that time

all counsel appeared for and on behalf of their clients and the attorneys for plaintiff and defendants both resisted the insurance company's Motion to Interevene. (R 41).

After hearing argument from counsel for the respective parties, the Court being fully advised in the premises entered its Order denying the Motion of Transnational Insurance Company to intervene in the action for the purpose of protecting its interests on the issues of liability and damages. (R 41-42).

It is from that Order that the company has prosecuted this appeal.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE MOTION OF TRANSNATIONAL INSURANCE COMPANY FOR LEAVE TO INTERVENE IN THIS ACTION.

Rule 24(a), Utah Rules of Civil Procedure deals with intervention of right in certain legal actions. The rule provides as follows:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) * * * *

The question therefore presented by this appeal is whether or not Transnational Insurance Company has the right to intervene in this action under the provisions of Rule 24(a) and the facts of this case.

Appellant is unable to find any Utah cases directly in point dealing with the question here presented for consideration. There are, however, cases which deal with who may intervene and the requisite elements necessary for such intervention.

In *Dayton vs. Free,* 49 Utah 221, 162 Pac. 614, the Court held that the right to intervene is not limited to any particular kind of action or proceeding. The intervenor must have the requisite interest in the matter in litigation and the interest must be a pecuniary one, not merely a wish or a strong desire that either party should succeed.

The test usually applied to the right to intervene is whether the person seeking intervention may gain or lose by direct legal operation and the effect of the judgment ultimately entered in the matter. *Commercial Block Realty Co. vs. United States Fidelity & Guaranty Co.,* 83 Utah 414, 28 Pac.2d 1081.

In 67 C.J.S. Parties Sec. 59(d) it states:

> Intervention by a person primarily or ultimately liable to one of the parties with respect to the claim in suit has been considered proper where the requisites for intervention are otherwise present.

Appellant respectfully asserts that on the basis of Rule 24, Utah Rules of Civil Procedure and the tests set forth in the cases quoted that it should be permitted to intervene in this action. Certainly Transnational Insurance Company is not represented in this action and counsel for both plaintiff and defendants have resisted the Company's efforts to have its counsel represent its interests in this suit. It appears obvious that appellant is or may be bound by a judgment in this action in favor of plaintiff and against defendants. The interest of the company herein is a pecuniary interest since it is the only one who will respond in money paid on any judgment entered. If it is required so to do Transnational Insurance Company would certainly lose as the Court determined in *Commercial Block Realty Co. vs. United States Fidelity & Guaranty Co., supra.*

Even though there are no Utah cases which have previously dealt with this problem, there are cases from other jurisdictions directly supporting the right of an insurance carrier, such as appellant herein, to intervene in cases like the one at hand.

In *Matthews vs. Allstate Insurance Company,* 194 F. Supp. 459 (1961) the Federal District Court in Virginia was faced with an action by an insured occupant of an automobile to recover from her insurance carrier the amount of an unpaid judgment that she had obtained against an uninsured motorist. The Court held the insurer liable to the plaintiff insured for the amount of the judgment even though the insurer wasn't a party to the action indicating that the insurance company could have

intervened in the action had it chosen to do so. Since it did not intervene, having had a right to do so, the insurer was bound by the judgment even though its interests may not have been protected. In discussing the company's liability the Court said:

> Since the requirement of establishing legal liability of the uninsured motorist has been fully met by the plaintiff herein, the defendant's liability automatically attaches to that extent. *Id.* at 465.

Again the Court said:

> There is little doubt that the state court, with knowledge of the interest of the insurance company, would have appointed defendant's counsel as the attorney for Manning and Singleton. *Id.* at 464.

In disposing of the case the Court noted that even though Virginia has a statute prohibiting the joinder of an insurance company as a party defendant in such cases, the statute did not prevent intervention since "the statute is undoubtedly for the benefit of the insurer and does not foreclose the right to be added as a party defendant at its request where it is clear that the insurer has a definite interest in the action" and where all other avenues of appearance and defense are closed.

State Farm Mutual Automobile Insurance Company vs. Lester E. Brown, et al., 114 Ga. App. 650, 152 SE2d 641 (1966) was a case in which Brown brought suit against one Blakely as defendant and State Farm Mutual Automobile Insurance Company as nominal defendant

for damages arising out of an automobile collision allegedly caused by the negligence of Blakely. Blakely was an uninsured motorist and State Farm had issued an automobile liability insurance policy to Brown which provided for uninsured motorist coverage. The trial court overruled the insurer's general demurrer and motion to purge, but granted its application to intervene, and the insurer appealed and plaintiff cross-appealed. The Court of Appeals held that the insurer could not be made a party defendant, but had a right to intervene, even though the case was not in default.

In discussing the insurance company's application to intervene the Court stated at 152 SE2d 641, page 646:

> We recently held that under the uninsured motorists law the plaintiff's insurer has a constitutional right to urge, inter alia, the non-liability of the uninsured motorist where the case is in default as to him to contest the jurisdiction of the court. *State Farm Mut. Automobile Ins. Co. vs. Glover, supra.* We are unable to distinguish this decision on the ground that the case was in default as to the uninsured motorist, and we conclude that it must be followed.

The Court further said at page 646:

> The insurer does have a direct and immediate interest to protect in this kind of action, and it stands to lose or gain by the direct effect of the judgment.

The case of *State Farm Mutual Automobile Insurance Company vs. Glover* is reported at 113 Ga.App. 815, 149 S.E.2d 852.

See also, *Lamb vs. Horwick,* 48 Ill.App.2d 251, 198 N.E.2d 194; *Wert vs. Burke,* 47 Ill.App.2d 453, 197 N.E.2d 717; *Alston vs. Amalgamated Mutual Casualty Company,* 53 Misc.2d 90, 278 N.Y.S.2d 906.

State Farm Mutual Automobile Insurance Company vs. Jiles, 115 Ga.App. 193, 154 S.E.2d 286 (1967) was an action by a wife against a motorist for injuries received in a collision between automobiles operated by an uninsured motorist and her husband and the husband's action for medical expenses incurred on behalf of his wife, loss of her services, property damage to his automobile, and loss of use thereof. Plaintiffs' uninsured motorist insurer petitioned for intervention and moved for consolidation of the cases. The Trial Court sustained general demurrers and the insurer appealed. The Court of Appeals held that the insurer was entitled to intervene, but that the actions were not the kind which could be consolidated.

Another case which lends support to the holdings in those cases discussed above is *Indiana Insurance Company vs. Noble,* 265 N.E.2d 419 (Ind., 1970). That case involved an action to recover under the uninsured motorist provision of an automobile liability insurance policy. The Trial Court granted the insured's Motion for Summary Judgment and the insurer appealed. The Appellate Court held that although the 17 year old insured, through her next friend, filed an action against the uninsured motorist above without joining the insurer as a party defendant to litigate the issues of liability and damages, and where the insured had given preliminary and adequate notice of the filing and pendency of the action to the insurer

so that it could have taken appropriate action including intervention, the resulting judgment against the uninsured motorist was binding on the insurer absent any showing of fraud, misrepresentation or collusion.

See also, *Wells vs. Hartford Accident & Indemnity Company,* 459 S.W.2d 259 (1970) for cases cited by the court where insurers were estopped from relitigating issues in an action brought by an insured against the uninsured motorist when the insurer could have intervened in order to protect its interests.

It is apparent that the interest of appellant, Transnational Insurance Company, is a pecuniary one, and this is coupled with the fact that the company will be affected and will stand to lose or gain by direct legal operation of any judgment that may be granted. Also, to be considered with this set of circumstances is the fact that the company does not have any control over the defense of the action. As it now stands counsel for plaintiff and defendants could stipulate to a judgment in favor of plaintiff and against defendants without the right of appellant to say then yea or nay. After such action then plaintiff could then initiate an action against appellant on the policy thereby obviating appellant's right and the necessity of litigating the issues of liability and damages. It should be made clear that appellant does not contend or allege that counsel for the parties are going to so act at this time; however, appellant is subject to that risk.

To be considered further in this matter is the fact that if appellant does not seek to intervene in this action in order to protect its interests it will in all probability be estopped to do so in a subsequent action by plaintiff on the uninsured motorist provision of the policy. It would seem that the equities of the situation dictate that appellant be permitted to intervene in this action to reasonably protect its interests.

CONCLUSION

Based upon the foregoing argument and authorities, appellant takes the position that this Court should reverse the order of the District Court denying appellant leave to intervene in the above-entitled action for the purposes of having the issues of liability and damages fully litigated in order that appellant's interests in this matter be adequately protected.

Respectfully submitted,

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